

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

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In re:	§	CHAPTER 11 CASE
AGE REFINING, INC.,	§	
	§	CASE NO. 10-50501
Debtor.	§	
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**MOTION UNDER BANKRUPTCY RULE 9019 TO APPROVE
SETTLEMENT AND RELEASE AGREEMENT WITH
BLACK & VEATCH CORP. AND OVERLAND CONTRACTING, INC.**

TO THE HONORABLE LEIF M. CLARK, UNITED STATES BANKRUPTCY JUDGE:

Eric J. Moeller, the Chapter 11 Trustee (the “Trustee”) over the estate of AGE Refining, Inc., (the “Debtor”) in the above-captioned case (the “Case”), hereby files this motion (the “Motion”), pursuant to section 105(a) of Title 11 of the United States Code (the “Bankruptcy Code”) and Rule 9019(a) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), seeking an approval of a certain settlement agreement (the “Settlement Agreement”),¹ substantially in the form which is attached hereto as **Exhibit “1”**, by and among the Trustee, Overland Contracting, Inc. and Black & Veatch Corp. In support of this Motion, the Trustee respectfully represents as follows:

I. JURISDICTION, VENUE AND PROCEDURAL BACKGROUND

1. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

¹ Unless otherwise defined, capitalized terms shall have the meaning ascribed to them in the Settlement Agreement.

2. The statutory basis for the relief requested herein appears under sections 105(a), 501, 502 and 1107(a) of title 11 of the United States Code (as amended, the “Bankruptcy Code”) and Rule 9019(a) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

3. On February 8, 2010 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the “Bankruptcy Code”).

4. The Debtor continued to manage and operate its business as debtor-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code until, on July 6, 2010, the Trustee was appointed to this Case.

5. On or about March 17, 2010, the United States Trustee appointed the Committee of Unsecured Creditors (the “Committee”).

6. In response to a mechanical failure to the Debtor’s steam turbine generator (“STG”) in the middle of 2009, the Debtor hired Black & Veatch Corp. (“B&V”) and, later, its affiliate Overland Contracting, Inc. (“Overland”)² to assist in the engineering, procurement, construction commissioning and start up services for the replacement of the STG.

7. During the course of the STG Project, certain disputes arose between the Debtor, B&V and Overland.

8. The Debtor made two post-petition payments to B&V, pursuant to a critical vendor order,³ for a total of \$978,019.72 to be applied to outstanding pre-petition invoices. Shortly thereafter, the Debtor fell behind on payments for services performed both pre and post-petition. After the Debtor failed to (i) pay amounts billed for post-petition services (ii) honor

² Since B&V and Overland are related entities with aligned interests, their names may be used interchangeably and collectively for purposes of this Motion.

³ *Order Pursuant to 11 U.S.C. §§ 105(a), 363(b) and 503(b)(9) Authorizing the Debtor to Pay Prepetition Claims of Certain Critical Crude Suppliers and Other Critical Vendors* [Doc. #38] (the “Critical Vendor Order”).

non-financial covenants in the contract and (ii) provide adequate assurance of its performance acceptable to Overland, Overland ceased its post-petition work. It demobilized its staff at the job site and took with it certain work product and documentation prepared by Overland in connection with the Project. The Debtor contended that it needed the documents taken to complete the STG Project. Overland contended that the Debtor did not own and had no right to the documents due to its non-performance.

9. The Debtor contended that during the course of the Project, it disputed Overland's charges, the scope of Overland's work and the disputes continued after the Petition Date. Overland contends that the Debtor did not raise any disputes to Overland's charges and services until after Overland stopped performing under the contract. In fact, Overland contends that it was advised that it would be paid on a current basis as a critical vendor.

10. The largest source of funds used by the Debtor to pay Overland was proceeds received from its insurers. Causes for the delay in payments to Overland have included the insurance claims adjuster's concerns for the reasonableness of Overland's costs, as well as disagreements between the Debtor and its insurers over whether certain costs and expenses are covered in-kind replacements or uncovered "betterments" to the STG.

11. On or about April 21, 2010, in an effort to finish out the STG Project, the Debtor filed an *Emergency Motion Pursuant to 11 U.S.C. §§ 105, 362, 365, 541 and 542 to Compel Performance of Contractual Obligations and Turnover of Certain Files, Drawings and Property of the Estate From Overland Construction, Inc. and Black & Veatch Corp.* [Docket No. 191] (the "Debtor's Motion to Compel"). On the same day, Overland filed *Overland Contracting Inc.'s Motion to Compel Immediate Assumption or Rejection of Executory Contract or Alternatively*

Establish a Mechanism for Payment of Post-Petition Invoices [Docket No. 193] (“Overland’s Motion to Compel”).

II. RELIEF REQUESTED

12. By this Motion, the Trustee asks the Court to approve the Settlement Agreement, a copy of which is attached to this Motion as **Exhibit “1,”** and to authorize the Trustee to enter into such agreement with Overland and B&V. By a separate motion and agreement filed contemporaneously with this Motion, the Trustee seeks the Court’s approval of a compromise with its insurers, which will provide a source for funding of the Settlement Agreement with Overland and B&V. As described more fully below, this Settlement Agreement would resolve disputes with Overland and B&V. A proposed order approving the Settlement Agreement is attached to this Motion as **Exhibit “2.”** The trustee requests entry of an order substantially similar to the attached proposed order.

13. The key terms of the Settlement Agreement are as follows:⁴

- (a) Turnover of Drawings. B&V agrees to provide working copies of the design drawings and specifications prepared during the course of the STG Project to the Trustee and the Debtor shall hold a non-exclusive royalty-free license to use such drawings and specifications to the extent such use is limited to the operation, maintenance and repair of the STG.
- (b) Settlement Payment. The Trustee will make a cash payment to Overland in the amount of One Million Three Hundred Twenty-Five Thousand and no/100 dollars (\$1,325,000.00) in consideration for Overland and B&V’s promises, releases and other covenants provided in the Settlement Agreement (with an allowed administrative claim in an equivalent amount pending cash payment).

⁴ Nothing in this Motion is intended to modify the terms of the Settlement Agreement. The summary of key terms above is provided for the benefit of the Court and interested parties. To the extent the summary conflicts with the terms of the Settlement Agreement, the terms of the Settlement Agreement shall prevail.

- (c) Allowed Claims. The Trustee will further stipulate to the allowance of a general unsecured non-priority claim in favor of B&V for a total of Four Hundred Fifty Thousand and no/100 dollars (\$450,000.00).
- (d) Releases. The Parties will provide mutual releases as set forth more fully in the Settlement Agreement and will further dismiss the Debtor's Motion to Compel and B&V's Motion to Compel with prejudice, or the same shall be denied as moot.

III. ARGUMENTS AND AUTHORITY

A. Standards under Rule 9019(a)

14. Under Bankruptcy Rule 9019(a), the Court has discretionary authority to approve a compromise or settlement. *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995); *see also Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). Bankruptcy settlements “are a normal part of the process of reorganization” and are “desirable and wise methods of bringing to a close proceedings otherwise lengthy, complicated and costly.” *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980) (quoting *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939)).

15. Bankruptcy Rule 9019 provides that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” *See* FED. R. BANKR. P. 9019(a). The rule is silent, however, with respect to the standards to be applied when considering approval of such settlements or compromises. The Fifth Circuit has established the following factors to consider in determining whether approval is warranted:

- (a) the probability of success in litigation, with due consideration for the uncertainty in fact and law;
- (b) the complexity and likely duration of litigation and any attendant expenses, inconvenience and delay;

- (c) the proportion of creditors who do not object to, or who affirmatively support the proposed settlement; and
- (d) the extent to which the settlement is truly the product of arms' length bargaining and not the product of fraud or collusion.

See Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. Inc. (In re Cajun Elec. Power Coop. Inc.), 119 F.3d 349, 356 (5th Cir. 1997); *In re Jackson Brewing*, 624 F.2d at 602. In considering "all other factors," the Fifth Circuit has further explained that courts should consider the best interest of creditors, with proper deference to their reasonable views, and consider the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion. *See In re Cajun Elec. Power Coop. Inc.*, 119 F.3d at 356.

16. This Court is authorized to approve the Settlement Agreement. Section 105 of the Bankruptcy Code provides, in pertinent part, that "[t]he court may issue an order...necessary or appropriate to carry out the provisions of the [Bankruptcy Code]. A decision to accept or to reject a compromise or settlement is within the sound discretion of the Court. *See 9 Collier on Bankruptcy* 9019.02 (15th ed. rev. 2001). "Compromises are favored in bankruptcy" because they minimize the costs of litigation and further parties' interest in expediting administration of a bankruptcy estate. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (citing 9 *Collier on Bankruptcy* 9019.03[1] (15th ed. Rev. 2001)). A settlement need not result in the best possible outcome for a debtor, but must not "fall beneath the lowest point in the range of reasonableness." *Vaughn v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991).

17. In deciding whether to approve a settlement, a bankruptcy court does not conduct a mini-trial on the merits or engage in an independent investigation into the reasonableness of the proposed settlement, but instead "relies heavily on the trustee" and the court generally defers to

the trustee's judgment provided there is "a legitimate business justification" for the settlement. *Martin*, 91 F.3d at 395. Basic to the process of evaluating proposed settlements, then, is "the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 425 (1968). Courts will approve a debtor's settlement if the settlement is in the best interest of the estate. See *In re Marvel Entertainment Group, Inc.* 222 B.R. 243, 249 (D.Del. 1998).

B. Application of Settlement Agreement to Relevant Factors

18. The dispute with B&V and Overland is a typical construction dispute. While the Trustee could resolve the disputes through litigation, such litigation, even if successful, may prove more detrimental to the estate. To succeed on the merits of the dispute with Overland and B&V, the Trustee would have to prove the overcharges alleged against Overland, which could require evidence of such detail down to the individual welds that the Debtor alleged that Overland improperly applied. Further, the Overland dispute includes an interpretation of the EPC to determine whether the Trustee has contractual grounds to dispute invoices more than 15 days old and whether a license ostensibly granted under the EPC (i.e., to use Overland's design drawings and other intellectual and proprietary property) is severable and could survive a breach of the Contract. While it is possible that the Trustee could carry its burden on the foregoing issues, the costs and time required to do so would prove counterproductive to the estate and its creditors.

19. Considering all circumstances surrounding this Case and the Trustee's efforts to administer this estate, the terms of the Settlement Agreement prove most fair and equitable. The Settlement Agreement provides for the fastest manner for resolving the disputes with B&V and Overland. The Settlement Agreement is economical in that it reduced litigation and obtains

releases from a creditor asserting more than \$2 million in claims and has asserted mechanics' and materialmen's liens against property of the estate. The Settlement Agreement provides for one-time cash payment to B&V with proceeds received under a separate compromise with the insurers, and for the allowance of an unsecured claim at a reduced amount than originally asserted by B&V and Overland.

20. The Settlement Agreement is the product of true arms' length negotiations among the Parties. Other than the terms provided in the Settlement Agreement, there are no side agreements, arrangements or understandings between the Trustee and B&V or between the Trustee and Overland. The compromise presents a comprehensive and efficient resolution to the Overland/B&V disputes arising from the STG Project. On information and belief, the Settlement Agreement has the support of the Committee and Chase. For all of the foregoing reasons, the Trustee contends that the Settlement Agreement satisfies the applicable standards for such compromises and asks that it be approved by the Bankruptcy Court.

IV. NOTICE

21. Notice of this Motion will be served on all parties listed on the attached Limited Service List, which includes the United States Trustee, Chase Capital Corporation, the Committee and all parties requesting notice of matters in this Case. Such notice complies with Bankruptcy Rule 2002 and this Court's prior orders authorizing service on such a limited basis.

V. PRAYER

WHEREFORE, the Trustee respectfully requests that the Court enter an order, substantially similar to the proposed order attached hereto as **Exhibit "2"** approving the Settlement Agreement and authorizing the Trustee to take such actions as necessary to consummate the Settlement Agreement; and for such other relief as is just and proper.

Dated: March 1, 2011

Respectfully submitted,

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**SPECIAL COUNSEL TO ERIC J. MOELLER,
CHAPTER 11 TRUSTEE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of March, 2011, a true and correct copy of the foregoing document was filed with the Court and served electronically upon those parties registered to receive electronic notice via the Court's CM/ECF system and upon those parties listed on the attached service list by First Class United States Mail postage prepaid, unless otherwise noted. In addition to the foregoing, the undersigned has served true and correct copies of the foregoing motion and the proposed order to the following parties:

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